IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL ST.NO.17476 OF 2007

M/s.Shetty Brothers ...Appellant

vs.

M/s.D.A.Patel & Co. and Anr. ...Respondents

Mr.Shrikant Shetty i/b M/s.PDS Legal for the Appellant
Mr.Suresh Dubey i/b Mr.J.S.Kini for Respondent No.1

CORAM: A.S.OKA,J.
DATE : DECEMBER 12,2007.

P.C.:

1. The Appeal is by the original first Defendant. The first Respondent is the original plaintiff. The first Respondent claims to be an owner and landlord of plot No.69-B and the building by name Nandan Villa consisting of various shops and residential premises. According to the case of the first Respondent, prior to 1982 one Mr.Narayan Shetty was a monthly tenant in respect of the wooden Bakda/stall No.6 admeasuring 5′ X 4′ situated at/in the western side compound and southern corner and opposite to shop no.5 of the said building. The allegation of the first Respondent in suit is that in January/February 2001 the Appellant illegally and unauthorisedly and without their consent constructed B.M.Walls structure by demolishing the suit wooden stall/bakda and by increasing its area. The prayer made in the suit filed by the first Respondent is for declaring that the alleged unauthorised construction carried out by the Appellant is

illegal and contrary to the provisions of the Mumbai Municipal Corporation Act,1888. Mandatory injunction was prayed for enjoining the second Respondent i.e. the Municipal Corporation to pull down the alleged illegal construction made by the Appellant. The learned Trial Judge dismissed the suit by holding that the same was not maintainable. However, the learned trial Judge accepted the case made out by the first Respondent that the Appellant has carried out additions and alterations as mentioned in the plaint without permission of the first and second Respondent.

2. The leaned counsel for the Appellant pointed out that a suit was filed by the first Respondent against the Appellant in the court of Small Causes at Mumbai seeking eviction of the Appellant under the provisions of the Maharashtra Rent Control Act,1999. He pointed out that the ground of eviction pleaded in the suit was alleged illegal and unauthorised construction and additions and alterations carried out by the Appellant. It is pointed out that the said suit has been dismissed in default and even restoration application has been dismissed. His submission is that in case the said suit is restored to the file, the finding recorded by the trial court in the impugned Judgment and Order on the third issue may operate as res judicata. Relying upon the decision of the Apex Court in case of Smt.Ganga Bai Vs. Vijay Kumar and others [(1974) 2 S.C.C. page 393], he submitted that though in a normal course

an Appeal under section 96 of the Code of Civil Procedure,1908 only against a finding is not maintainable, when the said finding is likely to operate as res judicata, the Appeal is maintainable. He also fairly pointed out the view taken by a coordinate bench of the Apex Court in a subsequent decision in case of Pawan Kumar Gupta Vs. Rochiram Nagdeo [(1999) 4 S.C.C. page 243].

3. The submission of the learned counsel for the first Respondent is that the finding against which the Appellant is aggrieved will not operate as res judicata. In fact a statement to that effect has been made in the Affidavit in reply filed by a partner of the first Respondent to the Civil Application for condonation of delay.

4. I have perused the plaint and the written statement. I have perused the finding recorded by the trial court. Apart from the fact that the said finding will not operate as res judicata, the court of small causes is having exclusive jurisdiction under the provisions of section 33 of the said Act of 1999 to decide the suit filed by the landlord for eviction against the tenant and only the said court is having exclusive jurisdiction to decide whether a ground is made out by the landlord to seek eviction on the ground that the tenant has carried out additions and alterations of permanent nature.

5. In the subsequent decision of the Apex Court in case of Pavan Kumar Gupta (supra), in paragraph 19 the Apex Court has held thus :

"19. **Thus the sound legal position is this: if dismissal of the prior suit was on a ground affecting the maintainability of the suit any finding in the judgment adverse to the defendant would not operate as res judicata in a subsequent suit.** But if dismissal of the suit was on account of extinguishment of the cause of action or any other similar cause a decision made in the suit on a vital issue involved therein would operate as res judicata in a subsequent suit between the same parties. It is for the defendant in such a suit to choose whether the judgment should be appealed against or not. If he does not choose to file the appeal he cannot thereby avert the bar of res judicata in the subsequent suit."

(Emphasis added)

6. In view of the aforesaid discussion, it is obvious that the finding on the issue No.3 will not operate as res judicata. In view of this position, the Appeal preferred by the Appellant is not maintainable and the same is dismissed as such.

JUDGE